

**IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS**

AMCO BUILDERS & DEVELOPERS, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

TEAM ACE JOINT VENTURE,

Defendant/Counter-Plaintiff/Cross-Defendant,
and

HARTFORD FIRE INSURANCE CO.,

Defendant/Cross-Defendant,
and

ACME DEMOLITION/INTERVALE JOINT VENTURE,

Defendant-Appellee,
and

LEROY LOVE d/b/a ACME DEMOLITION CO.,

Defendant/Counter-Plaintiff/Cross-Plaintiff,
and

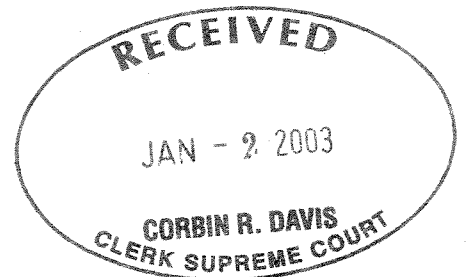
INTERVALE EXCAVATING & DEMOLITION, INC.,

Defendant-Appellee/Cross-Defendant,
and

TEAM CONTRACTING, INC., et al,

Defendants.

SC: 120459
COA: 221513
Wayne CC: 97-709362-CK
Hon. John A. Murphy



BRIEF ON APPEAL - APPELLANT

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STATEMENT OF JUDGMENT APPEALED

Plaintiff appeals from the Court of Appeals' reversal of the trial court's entry of default judgment against Defendant, Intervale Excavating & Demolition, Inc. Jurisdiction is based upon MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

- I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING A DEFAULT JUDGMENT AGAINST DEFENDANT INTERVALE EXCAVATING & DEMOLITION, INC. WHERE DEFENDANT FAILED TO COMPLY WITH AN ORDER ENTERED BY CONSENT MANDATING PRODUCTION OF DEFENDANT'S REPRESENTATIVE FOR DEPOSITION UNDER PENALTY OF DEFAULT.

THE TRIAL COURT ANSWERS "NO".

PLAINTIFF-APPELLANT ANSWERS "NO".

DEFENDANT-APPELLEE ANSWERS "YES".

THE COURT OF APPEALS ANSWERS "YES".

STATEMENT OF FACTS

Plaintiff, AMCO Builders & Developers, Inc., is a Detroit based contracting company. In 1996, the City of Detroit Housing Commission (DHC) instituted a new program for demolition and construction of city owned property called "JOC" - Job Order Contracting. The JOC program required forty percent of participation in any contract awarded by the DHC be minority participation and preference was given to those subcontractors who were Detroit based.

Defendant Team Ace Joint Venture (TAJV), a Baltimore based joint venture, and Plaintiff entered into a contract wherein Plaintiff would be the Prime Subcontractor for any contracts awarded to TAJV by the DHC.

Ultimately the DHC awarded TAJV the demolition of twelve buildings in the City of Detroit referred to as Section 1 of Herman Gardens, at a contract price of \$846,378.08 to TAJV. The contract executed between Plaintiff and TAJV on September 17, 1996, naming Plaintiff as the Prime Subcontractor, was in the amount of \$595,236.00.

Once the contract between Plaintiff and TAJV was executed, Plaintiff as Prime Subcontractor went about hiring local contractors to assist in the demolition. Plaintiff eventually contracted with Acme Demolition/Intervale Joint Venture (Acme/Intervale) at a contract price of \$244,000.00. Plaintiff also executed contracts with other subcontractors immaterial to these proceedings.

In November 1996, after the project was well underway, the owners of TAJV came to town with visions of increased profits achieved by cutting out TAJV's Prime Subcontractor, Plaintiff. In circumvention of the contract, TAJV solicited the services of Mr. Carson, President of Intervale Excavating & Demolition, Inc. (Intervale), a party to the contract executed between Plaintiff and Acme/Intervale. In violation of the contracts executed between Plaintiff and Acme/Intervale and

Plaintiff and TAJV, the owner of TAJV held a meeting with Mr. Carson on November 7, 1996. The next day, TAJV issued a \$40,000.00 check to Plaintiff's subcontractor, Intervale for the demolition work on Section 1 and later another check in the amount of \$25,000.00. One week later, TAJV and Intervale executed a contract for the removal of 50% of the project site's utilities for a contract price of \$80,000.00.

TAJV was paid in full on its contract with the City of Detroit, receiving in excess of \$840,000.00. Despite payment in full TAJV, paid Plaintiff a mere \$36,184.00. 90a,Tr., 3/18/99. TAJV paid Intervale, Plaintiff's subcontractor, \$65,000.00 for the demolition work of Section 1 of Herman Gardens, work that had been contracted to Plaintiff. Plaintiff promptly filed suit against Intervale, TAJV, TAJV's bondholder and the joint venture Acme/Intervale. Counter-claims and cross claims were subsequently filed. Plaintiff obtained a default judgment against Intervale, which is the subject of this appeal.

Although Intervale has characterized Plaintiff's default judgment against it as a windfall, in fact, the judgment places Plaintiff in no better position then had it been paid for the project it completed more than three years ago. Although Plaintiff received \$300,000.00 in settlement of its claims against TAJV (conditioned upon an indemnification clause), Plaintiff paid Acme Demolition Co. (Acme) \$65,000.00 of those funds in settlement of Acme's counterclaim.¹ Moreover, Plaintiff owed and paid over \$75,000.00 to numerous other contractors, such as Joy Construction and Hayes to perform work that was the responsibility of Intervale. Plaintiff also incurred attorney fees to prosecute its suit, and substantial interest on a loan Plaintiff was forced to take out in order to

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A copy of the \$65,000.00 settlement draft was provided to Intervale's current counsel pursuant to its request, prior to the filing of Intervale's appeal.

continue operating its company during the pendency of its lawsuit, all of which Plaintiff's principal testified to at the hearing on Plaintiff's damages. 90a ;Tr., 3/18/99.

The settlement between Plaintiff and TAJV was also not without risk to Plaintiff. TAJV insisted upon an indemnification clause, which Plaintiff was only willing to agree to if it were to receive a monetary award from Intervale, thereby adjusting Plaintiff's risk. TAJV's non-negotiable clause was one of several reasons Plaintiff refused to enter into a settlement with TAJV and Acme unless or until a monetary settlement or judgment was achieved with Intervale. 93a, Tr.3/18/99; 54a, Tr., 1/15/99; 114a, Tr. 4/30/99.

Moreover, at the hearing to set aside Intervale's default, Intervale's former counsel formally stated for the first time, that it intended on pursuing a claim against Plaintiff. 54a. Accordingly, absent a judgment, Plaintiff would have been exposing itself to a separate suit that had the potential of negating the benefit of the settlement reached between the other parties.²

STATEMENT OF RELEVANT PROCEDURAL HISTORY

Plaintiff initiated its lawsuit against all defendants on March 27, 1997, over five years ago. Many of the parties filed counter-claims and cross-claims and, accordingly, it became clear to all parties that settlement or arbitration should be seriously explored given the complicated and involved

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In fact, Plaintiff's concern was realized in 2000, when Intervale filed suit against Plaintiff, TAJV and Acme litigating the claim it alleged should have been brought as a counterclaim to the 1997 suit. The trial court denied AMCO's motion to dismiss based upon the prior judgment. Accordingly, AMCO is incurring attorney fees to defend this claim. If the Court of Appeals' ruling is affirmed, AMCO, the faultless party, will suffer substantial prejudice and Intervale will have been rewarded for not only its dilatory conduct, but for violating the trial court's discovery order. Intervale obtained a default judgment against TAJV in an amount in excess of \$105,000.00 and a default on liability against Acme for recovery of its alleged share of the settlement proceeds paid to Acme by Plaintiff/AMCO in this suit.

nature of the claims.

On or about October, 1998, following informal meetings held to discuss the possibility of arbitration and after mediation, Plaintiff and all defendants, except Intervale, reached a tentative settlement of their respective claims and counterclaims. The only contingency to entry of settlement was the participation of Intervale. 47a, 48a. As previously stated, Plaintiff was adamant about reaching a global settlement, given the indemnification clause in TAJV's settlement agreement and Intervale's informal references to the pursuit of a claim against Plaintiff. Plaintiff, however, was rebuffed at every turn in discussing a means of resolving the case with counsel for Intervale. Although counsel did participate in a telephone conference to discuss alternate dispute resolution, Intervale's counsel not only failed to attend mediation, but actively frustrated the process by sending a letter to the mediation tribunal threatening to file a motion to set aside the award if mediation were allowed to go forward without his presence.³ 58a, Tr., 1/15/99; 118-119a, Tr., 4/30/99. Counsel's threat was discussed at the mediation and resulted in a lower mediation award against Intervale in favor of Plaintiff.

As it became clear that Intervale was unwilling to resolve Plaintiff's claim, Plaintiff's counsel attempted to secure the deposition of Intervale's principal, Clarence Carson. 45a, 48a. Because defense counsel (Alex Miller) failed or refused to return many of counsel's calls, Plaintiff had to correspond with Mr. Miller by letter. Plaintiff was also compelled to unilaterally schedule Mr. Carson's deposition on more than one occasion, only to have Intervale cancel the deposition a day or two before the scheduled deposition date. 49a.

Intervale's counsel stated that he did not receive notice of the mediation and had a scheduling conflict that prohibited his attendance. 43a.

This is not to say that Intervale's counsel did not participate in the case. On the contrary, counsel timely filed an answer and affirmative defenses to Plaintiff's complaint, appeared at each and every status and settlement conference scheduled by the trial court and participated in an informal telephone conference held by all counsel to discuss the possibility of arbitration. Mr. Miller also corresponded with Plaintiff's counsel by letter and, occasionally by telephone. Rather than suggesting that personal problems were posing an obstacle to his defense of the case, Mr. Miller informed Plaintiff's counsel that it was his client, Mr. Carson, who was difficult to reach. Mr. Miller's personal problems were not known to Plaintiff's counsel until the fall of 1998, a year and a half into the case.

During one of the court ordered status/settlement conferences, Plaintiff's counsel informed the Court of her frustrations with Intervale's stonewalling regarding its failure to produce Mr. Carson for deposition. Intervale's counsel informed the Court that some of his difficulties in producing Mr. Carson for deposition stemmed from the illness of counsel's son. Mr. Miller also indicated, both to the Court and to Plaintiff's counsel, that he had been in contact with his client. In fact, counsel had stated that he had experienced difficulty in the past in reaching Mr. Carson because he had to arrange all communications with Mr. Carson through an intermediary.

As the trial court stated, counsel was questioned as to whether thirty days was sufficient to produce his client for deposition, to which Mr. Miller acknowledged that it was. No reservations were raised regarding the holidays, nor was additional time requested by Mr. Miller. An order was prepared by Plaintiff's counsel and forwarded to Intervale's counsel for review and approval. Mr. Miller approved the order for entry that day. The order set forth the consequences of Intervale's failure to produce its president for deposition within the time period specified, that being a motion

for default judgment. The order was entered November 23, 1998. 50a.

While under no obligation to do so, Plaintiff contacted defense counsel by letter dated December 9, 1998, again inviting settlement discussions between the parties or, in the alternative, dates for Mr. Carson's deposition. 52a. Mr. Miller failed to respond to counsel's letter and failed to produce Mr. Carson for deposition, prompting, pursuant to the trial court's order by consent, Plaintiff's motion for default judgment. The thirty day order provided ample time for Defendants to modify the order to request an extension, but no request was made.

Although Plaintiff's motion for default was filed and served a full three weeks prior to the hearing date, defense counsel waited until the day before the motion to contact Plaintiff's counsel. Defense counsel filed and served his response to Plaintiff's motion the day before the hearing, admitting the allegations which formed the basis of Plaintiff's motion. 57a-58a. At no time prior to the hearing did counsel offer specific dates for Mr. Carson's deposition. 52a.

Following oral argument this Court entered a default against Intervale on January 27, 1999, and scheduled an evidentiary hearing nearly a month later on the issue of damages. 65a. Defendant's counsel did not attend the hearing, instead filing on the day of the hearing a motion to adjourn. 84-85a, Tr., 3/18/99. The Court denied Intervale's motion on the record. Upon entry of the default judgment the remaining parties executed settlement agreements and an order of dismissal was entered by the Court. 93a, Tr., 3/18/99.

STATEMENT OF MATERIAL PROCEEDINGS

The trial court entered a default against Intervale on January 27, 1999 for failure to comply with the trial court's November 23, 1998 order. 65a. The trial court denied Intervale's motion to set aside that default on March 12, 1999. 71a. An affidavit was signed by Mr. Carson in support

of the motion to set aside the default. 68-69a. The trial court entered a Default Judgment against Intervale on March 18, 1999, following an evidentiary hearing on the issue of Plaintiff's damages. 95a. Defense counsel failed to attend the evidentiary hearing. 84-85a. An order modifying that Judgment, for the purpose of correcting the corporate name of the defendant, was entered on March 22, 1999. 100-102a.

Following entry of default judgment, orders of dismissal were executed by all other parties and entered by the trial court on March 18, 1999 and April 20, 1999. 98a, 103a, 105a. Subsequent to entry of the default judgment, Intervale retained current counsel.⁴ Intervale's new counsel filed a motion to set aside the default judgment which was heard and denied on April 30, 1999. 114-136a.

Intervale filed its Claim of Appeal and oral argument was held June 5, 2001. The Court of Appeals issued its per curiam opinion, dated November 21, 2001, reversing the trial court's entry of default judgment, holding that Judge Murphy abused his discretion in entering the default. 39a. Thereafter, Plaintiff timely filed its Application for Leave to Appeal, seeking a reversal of the Court of Appeals' order.

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Current counsel was hired by Mr. Miller's malpractice carrier to pursue this appeal. Prior to the Court of Appeals' ruling, Intervale's counsel confirmed that the malpractice insurer reached a monetary settlement with Intervale in the amount of \$250,000.00, and is also paying the cost of not only this appeal but the 2000 case filed by Intervale against AMCO. Moreover, pursuant to the settlement terms, the insurer will share in any recovery Intervale receives by settlement or judgment against AMCO in the 2000 case. 137-140a.

ARGUMENT

I. THE TRIAL COURT’S RULING, IN ENTERING A DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH AN ORDER BY CONSENT, WAS NOT PALPABLY AND GROSSLY VIOLATIVE OF FACT AND LOGIC AND SHOULD, THEREFORE, NOT BE DISTURBED ON APPEAL.

A. Introduction

The issue of a trial court’s discretion in ruling upon a motion for entry of default or default judgment was addressed by this Court in *Alken-Ziegler, Inc v Waterbury Headers Corporation*, 461 Mich 219; 600 NW2d 638 (1999).

In *Alken-Ziegler*, the issue before the Court was whether the Court of Appeals had erred in reversing the trial court’s grant of default and default judgment for failure to respond to the plaintiff’s summons and complaint. This Court ruled that the Court of Appeals had overstepped its bounds by replacing its judgment with that of the trial court’s, in contravention of the applicable standard of review, abuse of discretion. Accordingly, this Court reversed the appellate court and reinstated the default judgment. *Id.*

Here, as evidenced by the record, the trial court was within its discretion in entering a default and a default judgment as a result of Intervale’s failure to comply with the trial court’s discovery order, which was entered by consent. The appellate court, however, not only ruled that Judge Murphy abused his discretion, but that Intervale’s counsel had abandoned his representation (an argument that was not raised by Intervale), and therefore, Intervale should not be bound by the default judgment. It is patently clear from the record, and as recognized by Judge Zahra in his dissent, that Intervale’s counsel did not abandon his representation. Moreover, there is no basis upon which to find that Judge Murphy’s ruling is devoid of all fact and logic which is the requisite finding to

support a reversal of the trial court.

For the reasons stated below, the appellate court's Opinion is clearly erroneous. This Court should, therefore, reverse the Court of Appeals' November 2, 2001 ruling and reinstate the default judgment which was properly entered against Intervale by the trial court.

B. Standard of review.

The appropriate standard of review of a trial court's grant of a default or default judgment is abuse of discretion. *Alken-Ziegler*, supra. In *Alken-Ziegler* this Court discussed the applicable standard of review in some detail stating,

The ruling on a motion to set aside a default or a default judgment is entrusted to the discretion of the trial court. *Park v American Casualty Ins Co*, supra. Where there has been a valid exercise of discretion, appellate review is sharply limited. *Wendel v Swanberg*, 384 Mich 468, 475; 185 NW2d 348 (1971). Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside. *Kellom v City of Ecorse*, 329 Mich 303; 45 NW2d 293 (1951), *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW2d 176 (1955), *Cramer v Metropolitan Savings Ass'n (Amended Opinion)*, 136 Mich App 387, 398; 357 NW2d 51 (1984), and *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992).

An abuse of discretion involves far more than a difference in judicial opinion. This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters. For example, the Court stated in *Scripps v Reilly*, 35 Mich 371, 387 (1877):

It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been.

And in *Detroit Tug & Wrecking Co v Gartner*, 75 Mich 360, 361; 42 NW 968 (1889), the Court said:

To warrant this Court in interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon consideration of the facts

upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made. [FN5]

Moreover, although the law favors the determination of claims on the merits, see, e.g., *Huggins v MIC General Ins Corp*, 228 Mich App 84, 86; 578 NW2d 326 (1998), [footnote omitted] it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered. See, e.g., *White v Sadler*, 350 Mich 511, 521; 87 NW2d 192 (1957), *Thomas v Jones*, 120 Mich App 191, 192; 327 NW2d 433 (1982), *Dogan v Michigan Basic Property Ins Ass'n*, 130 Mich App 313, 320; 343 NW2d 532 (1983), *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 295; 416 NW2d 415 (1987), and *Perry v Perry*, 176 Mich App 762, 769; 440 NW2d 93 (1989).

* * *

Our “great deference” to matters involving the discretion of the trial court comports with the approach in other jurisdictions. See, e.g., the definitions of “abuse of discretion” in *Adams v Borello*, 975 SW2d 188, 191 (Mo App, 1998), a judicial act that is untenable and clearly against reason and that works an injustice, *Burke v Harman*, 6 Neb App 309, 348; 574 NW2d 156 (1998), a clearly untenable ruling that unfairly deprives a litigant of a substantial right and a just result, *Yeap v Leake*, 60 Cal App 4th 591, 598; 70 Cal Rptr 2d 680 (1997), a ruling that exceeds the bounds of reason, considering all the circumstances that are before the court, and *State v Garza*, 192 Ariz 171, 175, n 7; 962 P2d 898 (1998), where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice; a ruling that reaches an end or purpose not justified by, and clearly against, reason and evidence. n.228

Id.

In light of the applicable standard of review as set forth by this Court, the Court of Appeals’ ruling must be reversed, as there can be no showing that the Judge Murphy’s ruling is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Id.*

C. Analysis.

Intervale's brief on appeal relied, in part, on MCR 2.612(C)(1)(f), which was mentioned by the Court of Appeals in its decision to reverse the trial court. Pursuant to MCR 2.612(C)(1)(f), a trial court may set aside a judgment for "any other reason justifying relief from the operation of the judgment." Under this subsection the appellate court must be satisfied that three requirements have been met: 1) the reason for setting aside the judgment must not fall under subrules (1) through (5), 2) the substantial rights of the opposing party must not be detrimentally affected if the motion is set aside, and 3) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice. *Lark v Detroit Edison Co*, 99 Mich App 280, 284; 297 NW2d 653 (1980)(holding that defendant failed to meet any of the requirement and that the trial court, therefore, did not abuse its discretion in denying the defendant's motion to set aside a default judgment). Generally, relief is granted under subsection (f) "only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered." *McNeil v Caro Community Hospital*, 167 Mich App 492, 497; 423 NW2d 241 (1988); *Marshall v Marshall*, 135 Mich App 702, 712; 335 NW2d 661 (1984), *Lark, supra*.

In *McNeil*, the trial court set aside an order dismissing the plaintiff's case based on the improper conduct of the plaintiff's attorney. In reversing the trial court's decision, the appellate court applied the three prong test. Observing that the order of dismissal was not obtained as a result of the conduct of the party opposing the motion to set aside, the appellate court reversed and reinstated the dismissal. In distinguishing *Coates v Drake*, 131 Mich App 687; 346 NW2d 858 (1984), a case which also involved allegations of a dismissal due to the conduct of the attorney, the appellate court noted that in *McNeil* the facts were not as egregious and thus the

extraordinary circumstances were not present.

In *Coates*, the plaintiff's attorney settled a case without his client's knowledge and forged the client's signature on the settlement check and appropriated the money to his own use. In contrast, counsel in *McNeil* was alleged to have dismissed his client's case without her consent following counsel's failure to file a second amended complaint within the time limits specified in the court's order. The *McNeil* plaintiff also alleged that she was unaware of the posture of the case until after its dismissal. Based on the plaintiff's affidavit, produced by new counsel, the trial court set aside the dismissal. On appeal the court conceded that the plaintiff may have a claim for legal malpractice against her former attorney, but held that the trial court abused its discretion in finding, on the above facts, that "extraordinary circumstances" existed for reinstating the case.

Similarly, Mr. Carson's and Mr. Miller's affidavits failed to set forth any facts which would even hint that the default judgment was obtained by the improper conduct of Plaintiff. The facts of this case and those of *McNeil* are nearly identical. Plaintiff contends that the same result should be reached here. As stated by the trial court in refusing to set aside the default judgment, Intervale's remedy lies, if at all, in a malpractice case against its counsel, rather than setting aside a judgment properly entered nearly four years ago.⁵

Plaintiff asserts that its rights would be substantially and detrimentally affected if this Court were to allow the Court of Appeals' ruling to stand. Plaintiff's decision to settle with the remaining defendants was conditioned on a judgment being entered against Defendant Intervale.

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As previously stated the malpractice insurer reached a monetary settlement with Intervale.

Intervale stated on various occasions that it intended to file a counterclaim against Plaintiff.⁶

Settlement documents and dismissals were entered *only after* the default judgment was entered against Intervale.

In fact, Intervale was permitted to file a complaint against AMCO, despite the judgment entered against Intervale in AMCO's favor.⁷ In short, if the Court of Appeals' ruling is allow to stand, AMCO will be severely prejudiced by losing the benefit of its judgment, while exposing itself to the risk of having to defend and indemnify TAJV in other suits arising out of this contract, and having to defend against a claim brought by Intervale (which should have been raised, if at all, in the 1997 case). Intervale will have been unfairly rewarded for its refusal to participate in its defense in the underlying case.

As explained in *Krone by Krone v Balsis*, 163 Mich App 555, 559; 415 NW2d 857 (1987), in reversing the trial court's decision to set aside an acceptance of a mediation award on the grounds of neglect by the party's attorney, "in exercising [the trial court's] discretion the court must strike a balance between remedying injustice on the one hand and the desire to achieve finality in litigation on the other hand." In reversing and remanding the case for entry of

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Intervale raised the issue of a potential claim against Plaintiff at the motion to set aside the default. The default was entered as a result of Intervale's failure to comply with a court order, not for failing to timely file an answer to the complaint. Accordingly, the appropriate standard is not whether Intervale has good cause and a meritorious defense. Moreover, due to Intervale's defaulted status, Intervale had no right to participate in the case and certainly no right to assert a counterclaim. Therefore, Plaintiff was under no obligation to respond to the merits of a potential claim.

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Intervale was also allowed to pursue a claim against TAJV which resulted in a default judgment being entered in Intervale's favor of more than \$105,000.00. The default judgment was entered against TAJV as a result of TAJV's counsel withdrawing and TAJV failing to retain substitute counsel to defend the claim.

judgment, the court noted that “[g]enerally, the neglect of an attorney is attributable to his client . . . Moreover, if the actions of plaintiff’s attorney have caused plaintiff to suffer loss, the possibility of an action against the attorney exists.” *Id.*; *See also Alken-Ziegler, supra*. Again, an appropriate remedy existed, and was utilized, to compensate Intervale for the alleged neglect of Intervale’s counsel.

In *Traxler v Ford Motor Co*, 227 Mich App 276, 287; 576 NW2d 398 (1998), the appellate court addressed the issue of whether the trial court's entry of default judgment against Ford for discovery abuses was appropriate. Ford argued that the trial court should have considered the conduct of Ford's counsel when ruling on the default. In affirming the default, the appellate court summarily disposed of Ford's defense by stating that, "the trial court had the authority to order the default against Ford even if its attorneys were responsible for the misconduct." *Id.* at 297, citing *White v Sadler*, 350 Mich 511; 87 NW2d 192 (1957) (holding that the neglect of an attorney is generally regarded as attributable to his client).

In *White*, the Court found it compelling that no evidence was presented to suggest that the defendant inquired of his then attorney about the disposition of the case until the default judgment had been entered. Similarly, Mr. Carson’s Affidavit does not allege that he contacted his attorney to inquire as to the status of his case. In analyzing other jurisdictions on the issue of imputing the attorney’s negligence to his client, the Court concluded that “the decision in most of the states are to the effect that the neglect or mistake of an attorney or agent must be treated as that of his principal, and hence whenever the mistake, negligence or inadvertence relied upon is of so gross a character that it would not have entitled the party to relief had it been his own, it is equally unavailable to procure him relief when attributable to his attorney.” *Id.* at 524.

In *Doan Construction Co v Stolaruk Corp*, 131 Mich App 589; 345 NW2d (1983), the court of appeals upheld the trial court's entry of default judgment for failing to comply with a court-ordered deposition, finding no abuse of discretion. Defense counsel in *Doan* signed an order which stated that the defendant's failure to appear for deposition would result in defendant's pleadings being struck and a default judgment would be entered. *Id.* at 591. During the pendency of the order, defendant retained new counsel who was aware of the court order and who advised plaintiff's counsel that the defendant would be unable to appear on the date set forth in the order. Following the expiration of the order, plaintiff's counsel filed a motion for entry of a default judgment, which was granted. *Id.* at 592. In affirming the trial court's ruling, the court of appeals found persuasive the fact that newly obtained counsel knew and stipulated to the court-ordered deposition and that the defendant had an additional nine days before the hearing on the default judgment to make his representative available for deposition. Moreover, the court also noted that the "defendant could have asked the trial court within that nine day period to modify its order, but failed to do so." *Id.* The pertinent facts in *Doan* are strikingly similar to the facts of this case.

Here counsel consented to the court-ordered deposition of Mr. Carson, but failed to comply resulting in the penalty expressly stated in the order. Moreover, rather than a mere nine days prior to the hearing on Plaintiff's motion for entry of default, Intervale had a full 54 days between entry of the order and the hearing date to request additional time or to produce Mr. Carson for deposition. Even after Plaintiff counsel's invitation of December 9, 1998 for dates for Mr. Carson's deposition, Intervale still chose not to respond until the day before the hearing and even then refused to offer any dates for the production of Mr. Carson. 52a, 53a. Accordingly,

the analysis in *Doan* supports upholding the trial court's entry of default judgment here.

More recently, in *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544; 620 NW2d 646 (2001), this Court affirmed the trial court's denial of defendant's motion to set aside a default judgment entered for failure to comply with discovery. The cases are substantially similar, in that the plaintiff in *Zaiter* had attempted on numerous occasions to obtain the participation of defense counsel in the case, and to obtain answers to discovery and the deposition of defendant's principals. Moreover, in *Zaiter*, plaintiff had noticed defendant's deposition on several occasions only to have defense counsel cancel. *Id.* at 547. Similarly in this case, Plaintiff's counsel attempted unsuccessfully to obtain the cooperation of Intervale's counsel in the case and scheduled Mr. Carson for deposition several times, only to have Mr. Miller cancel the deposition a day or two before the scheduled date.

Conversely, despite a record which supported the contention that plaintiff's counsel in *Zaiter* had failed to participate in the case in any meaningful way for as much as five months, there was no suggestion by the Court of Appeals, this Court, or, for that matter, the litigants, that defense counsel in *Zaiter* had abandoned her representation. Similarly, and as recognized by Judge Zahra in his dissenting opinion, there is no basis to hold that Intervale's counsel abandoned his representation. To hold otherwise would be to open a floodgate of claims of abandonment of counsel by parties seeking to avoid default judgments. Parties would be hesitant to resolve claims by default, unable to rely on the trial court's ruling. Cases would linger on the trial court's docket and the dilatory party would essentially have the upper hand in litigation. As it was, this case took two years to resolve itself, because of the lack of cooperation by Intervale. Had a default judgment not been entered, the parties would have had no choice but to try a case

which was uniquely complex in its subject matter and because of its many cross-claims and counterclaims.

Intervale has insisted that Mr. Carson is not culpable and therefore the default judgment works a manifest injustice. However, defense counsel communicated to Plaintiff's counsel on more than one occasion prior to November, 1998 that it was counsel's client that was inaccessible and that he had to arrange all communications through a third party. Moreover, Intervale's more current representation that Mr. Carson was unaware of Plaintiff's desire to take his deposition until April, 1999, is inconsistent with Mr. Miller's assertion, on the record and in the attached correspondence, that he had spoken to his client in November, 1998, December, 1998 and January 1999, and that his client was available for deposition. Furthermore, as correctly noted in the Court of Appeals' dissenting Opinion, Mr. Carson was aware of the status of the case prior to signing the affidavit dated April 22, 1999. Mr. Carson signed an affidavit dated February, 3, 1999, in support of a motion to set aside the default, which contradicts his later affidavit of April 22, 1999, wherein he stated he had no knowledge prior to April 14, 1999, that a default had been entered against Intervale.

As the default judgment states, Intervale is entitled to a set-off for all sums recovered by Plaintiff against Defendant TAJV. Accordingly, the judgment was reduced by \$300,000.00. The judgment against Intervale, therefore, is for the sum of \$295,606.00. If Plaintiff were to receive payment on the judgment, the total - far from resulting in a windfall to Plaintiff - would be the amount Plaintiff should have received when it completed the demolition contract in 1998. The majority's Opinion ignored the set off language contained in the Judgment, but this error was correctly observed by the dissent.

II. THERE IS NO RECORD TO SUPPORT THE COURT OF APPEALS' FINDING THAT INTERVALE'S COUNSEL ABANDONED HIS REPRESENTATION.

In order to reverse the trial court's entry of default judgment, this Court must find that Judge Murphy's ruling was palpably and grossly violative of fact and logic or that Intervale's counsel abandoned his representation of his client. Plaintiff submits, as did Judge Zahra of the Court of Appeals, that no record exists to support such a finding. The sole case relied upon by the majority in reversing the lower court and ruling that defense counsel had abandoned his representation, is entirely distinguishable from the present case.

In *Pascoe v Sova*, 209 Mich App 297; 530 NW2d 781 (1995), the appellate court reversed the trial court's entry of a default judgment which was entered after granting the defense counsel's request to withdraw made on the day of trial and without notice to the defendant. The trial court then allowed the case to proceed to trial. *Pascoe* and this case are obviously inapposite. Moreover, *Pascoe* is the only case relied upon by the majority in holding that Intervale's counsel abandoned his representation. Here, defense counsel did not withdraw from the case as in *Pascoe*, nor did he enter into a settlement without his client's consent, or forge his client's signature on a settlement check and appropriate the money to his own use as in *Coates, supra*. At most, assuming Mr. Carson's affidavit is to be believed, defense counsel was negligent in his representation of his client, which, pursuant to controlling law, is attributable to the client. *White, supra* at 525.

As previously stated, Intervale's counsel timely filed an answer and affirmative defenses to Plaintiff's complaint, attended every court ordered status and settlement conference, corresponded by letter to the mediation tribunal, corresponded by letter to counsel and

occasionally by telephone, and participated in a telephone conference to explore the possibility of alternative dispute resolution. In addition, counsel filed a response and appeared for oral argument at the hearing on Plaintiff's motion for entry of default and at Intervale's motion to set aside the default. It was apparent to all parties and the Court, that counsel was representing Intervale, regardless of the diligence of that representation.

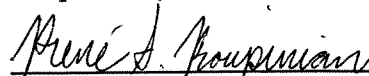
The record also supports the contention that Intervale was uncooperative, and fully aware of the status of the case prior to entry of the default judgment against it. Moreover, controlling case law cited herein recognizes that a client, such as Intervale, has an obligation to inquire as to the status of a case that had been pending before the trial court for two years. *White*, supra. If Mr. Carson's affidavit is to be believed, that he was under the impression that his counsel had pursued a counterclaim to recover for alleged breach of contract in excess of \$500,000.00, common sense would dictate that a business owner would have made some inquiry in the two years the case was pending as to the status of such a claim.

Accordingly, there is no basis upon which to hold that Mr. Miller abandoned his representation of his client. Rather, a sufficient record exists to support a finding that Mr. Miller adequately represented his client and for a number of possible reasons, none of which warrant the setting aside of Judge Murphy's order, failed to comply with a discovery order.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court reverse the Court of Appeals' November 2, 2001 Opinion and reinstate the trial court's default judgment against Intervale, pursuant to MCR 7.302(F)(1).

Respectfully submitted,



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